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No. 34 129

In the Supreme Court of the United States

OCTOBER TERM, 1929

ROBERT H. LUCAS, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

SYBIL WHITEHOUSE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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PETITION

The Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the First Circuit entered in the above cause on February 17, 1930, affirming the decision of the United States Board of Tax Appeals.

QUESTION PRESENTED

Whether an annuity actually paid out of the income of an estate under a will which does not direct

it to be paid out of income is taxable as income to the recipient under the provisions of the Revenue Act of 1921.

STATEMENT

This case reached the Circuit Court of Appeals on the petition of the Commissioner of Internal Revenue for a review of the decision of the Board of Tax Appeals determining that there was no deficiency in respondent's income tax for the year 1921. (R. 33.)

James Gordon Bennett died May 24, 1918, leaving a last will and testament, the material provisions of which are set forth in the record. (R. 15–20, 43–48.) Under the will, the testator provided for a number of annuities to be paid to various individuals, including the respondent. The terms of the will relating to the annuity in question are as follows (R. 16):

> Tenth: I also give and bequeath to the said Sybil Douglas, wife of William Whitehouse, an annuity of Five thousand dollars.

The will further provided (R. 44):

> All the above annuities mentioned in paragraphs ten to twenty-five of this my Will shall be paid in equal semi-annual payments reckoning from the time of my death.

In paragraph twenty-nine of the will the testator stated that it had been his intention and purpose to establish a substantial and permanent memorial to his father, the founder of the New York Herald.

To carry out this intention the will provided that the testator's executors should incorporate a corporation to be named "The James Gordon Bennett Memorial Home for New York Journalists." The general objects and purpose of the corporation were to provide and maintain a suitable and comfortable home or to provide pecuniary aid for certain persons employed by newspapers in the Borough of Manhattan, City of New York. (R. 45.) The will devised and bequeathed all of the residue of the estate of the testator to this corporation. (R. 48.)

The will also provided (R. 48):

> I authorize and empower said Executors or Executor to retain and hold any personal property which may belong to me at the time of my death and to set aside and hold any part thereof to provide for the payment and satisfaction of any annuity given by me. * * *

The annuity provided for the respondent was paid to her in 1921 by the executors of the will of the testator, out of the income of the estate. (R. 20.) No provision of the will directed this, and in previous years the annuity had been paid from principal. (R. 20–21.)

In November, 1921, the executors filed in the Surrogate's Court for the County of New York, an intermediate account of settlement which was thereafter approved by the court. (R. 20.) This account

shows that on December 30, 1920, the executors permanently set aside to the James Gordon Bennett Memorial Home for New York Journalists Corporation, as part of the residuary estate but subject to taxes, annuities, and other charges, securities to the value of $3,133,260.00. (R. 21.)

SPECIFICATION OF ERRORS TO BE RELIED ON

The Circuit Court of Appeals erred in holding that the annuity paid during 1921 was exempt as a legacy under Section 213 (b) (3) of the Revenue Act of 1921, and in refusing to hold that the payment was taxable income within the meaning of Sections 213 (a), 219 (a), and 219 (d) of the Revenue Act of 1921.

REASONS FOR GRANTING THE WRIT

I. The case involves an important question of statutory construction. Section 219 of the Revenue Act of 1921, c. 136, 42 Stat. 227, 246 (*infra*, pp. 8-9), appears to require the taxation of all income of estates (particularly when read in connection with Section 213 (a) of the same Act (p. 7, *infra*) which provides that gross income shall include income from any source whatever), while Section 213 (b) of the same Act (p. 8, *infra*) exempts from taxation the value of property acquired by bequest. The latter section does not expressly limit the exemption to bequests of corpus as distinguished from bequests of income, although it requires that the income from bequests be included in gross income.

II. The decision of the Circuit Court of Appeals is probably in conflict with the decision of this Court in *Irwin* v. *Gavit*, 268 U. S. 161, and *Beatty* v. *Heiner*, 276 U. S. 598. In *Irwin* v. *Gavit, supra*, this Court held that the provisions of the Revenue Act of 1913 exempting bequests assumed the bequest of a corpus, and were not intended to exempt the bequest of income from a trust fund. *Beatty* v. *Heiner, supra*, was decided on the authority of *Irwin* v. *Gavit, supra*. In the present case, the annuity was actually paid out of the income of the estate, but the effect of the decision of the Circuit Court of Appeals is that the annuity was nevertheless exempt as a bequest. There appears to be no reason to construe the Revenue Act of 1921 differently from the Revenue Act of 1913 in this respect.

III. The question is one of present importance. The relevant provisions of the Revenue Act of 1921 are repeated in substance in the Revenue Acts of 1924, 1926 and 1928. (See Sections 213 (a), 213 (b) (3), 219 (a) and 219 (b) (3) of the Revenue Act of 1924, c. 234, 43 Stat. 253, 267, 268, 275, 276, U. S. C., Title 26, Secs. 954 and 960; Sections 213 (a), 213 (b) (3), 219 (a) and 219 (b) (3) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 23, 24, 32, 33, U. S. C. App., Title 26, Secs. 954 and 960; Sections 22 (a), 22 (b) (3), 161 (a) and 162 (c) of the Revenue Act of 1928, c. 852, 45 Stat. 791, 797, 798, 838, 839, U. S. C. Supp. III, Title 26, Secs. 2022, 2161 and 2162.) The same question is now pending

in other cases, and will probably arise repeatedly in the future.

Wherefore, it is respectfully submitted that the petition should be granted.

THOMAS D. THACHER,
Solicitor General.

MAY, 1930.

BRIEF IN SUPPORT OF THE PETITION

OPINIONS BELOW

The findings of fact and opinion of the Board of Tax Appeals (R. 14) are reported in 7 B. T. A. 600. The opinion of the United States Circuit Court of Appeals (R. 59) is reported in 38 F. (2d.) 162.

JURISDICTION

The order of the Circuit Court of Appeals affirming the decision of the Board of Tax Appeals was entered on February 17, 1930. (R. 62.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATUTES INVOLVED

The relevant provisions of the Revenue Act of 1921, c. 136, 42 Stat. 227, 237, 238, 246, are as follows:

> SEC. 213. That for the purposes of this title * * * the term "gross income"—
>
> (a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the

ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * * but

(b) Does not include the following items, which shall be exempt from taxation under this title:

* * * * *

(3) The value of property acquired by gift, bequest, devise, or descent (but the income from such property shall be included in gross income);

* * * * *

SEC. 219. (a) That the tax imposed by sections 210 and 211 shall apply to the income of estates or of any kind of property held in trust, including—

(1) Income received by estates of deceased persons during the period of administration or settlement of the estate;

* * * * *

(4) Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, and the income collected by a guardian of an infant to be held or distributed as the court may direct.

* * * * *

(c) In cases under paragraphs (1), (2), or (3) of subdivision (a) or in any other case within subdivision (a) of this section except paragraph (4) thereof the tax shall be imposed upon the net income of the estate or

trust and shall be paid by the fiduciary, except that in determining the net income of the estate of any deceased person during the period of administration or settlement there may be deducted the amount of any income properly paid or credited to any legatee, heir, or other beneficiary. * * *

(d) In cases under paragraph (4) of subdivision (a), and in the case of any income of an estate during the period of administration or settlement permitted by subdivision (c) to be deducted from the net income upon which tax is to be paid by the fiduciary, the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary that part of the income of the estate or trust for its taxable year which, pursuant to the instrument or order governing the distribution, is distributable to such beneficiary, whether distributed or not, or, if his taxable year is different from that of the estate or trust, then there shall be included in computing his net income his distributive share of the income of the estate or trust for its taxable year ending within the taxable year of the beneficiary. * * *

ARGUMENT

I

ANNUITIES PAID OUT OF THE INCOME OF ESTATES ARE TAXABLE AS INCOME AND NOT EXEMPT AS BEQUESTS

During 1921, the taxable year in question, the executors of the will of James Gordon Bennett paid to the respondent (annuitant) the annual amount

provided by the will, the payment being made out of the income of the estate. (R. 20.) The will did not specify that it should be paid out of income, and in previous years it had been paid out of principal. (R. 20-21.) In determining whether such payment is taxable income, it is important at the outset to examine the statute in the light of all relevant provisions. Section 213 (a) of the Revenue Act of 1921, *supra*, contains the broad provision that gross income includes income derived from any source whatever. Section 219 (a), *supra*, applies the tax to all income of estates, including (paragraphs 1 and 4 of Section 219 (a), *supra*) income received during the period of administration, and income distributed to beneficiaries periodically whether or not paid at regular intervals. Section 219 (c), *supra*, requires the fiduciary to pay the tax on all income except that distributed periodically to the beneficiary, and the beneficiary pays the tax on the income distributed periodically, as provided in Section 219 (d), *supra*.

The foregoing provisions of the statute are comprehensive, harmonious, and sufficient in themselves to establish that all income of estates is subject to the income tax, either in the hands of the fiduciary or the beneficiary, depending upon whether it is periodically distributed. The payment of an annuity is, of course, a periodic distribution, and, if taxable, is taxable to the beneficiary.

Respondent urges that Section 213 (b), *supra*, which exempts bequests, has the effect of exempt-

ing the annuity payment even though such payment is made from income. Petitioner urges, on the other hand, that this exemption, when read in the light of the other sections of the statute, can apply only to bequests of capital as distinguished from bequests of income.

Section 219 (d) provides that the fiduciary (executor) is not to pay the tax, and if taxpayer's theory is correct the income is exempt as a bequest. The taxpayer's theory consequently would defeat the express intention to tax such income as expressed in Sections 219 (a) (4) and 219 (d).

It is elementary that the statute is to be construed as a whole so as to give effect to its manifest purpose and intent. Moreover, different provisions of a statute are to be reconciled, as far as practicable, so as to render them consistent and harmonious, giving a reasonable and practical effect to each. *Cox* v. *Timm,* 182 Ind. 7, 13; *Bowman* v. *Hamlett,* 159 Ky. 184, 191; *State* v. *Coupe,* 91 Neb. 463, 467. We therefore contend that the statute was designed to tax as income to the beneficiary all of the income of an estate actually distributed to the beneficiary as such, exempting only bequests of capital. Congress intended to use its power to the full extent. *Eisner* v. *Macomber,* 252 U. S. 189, 203.

The principles underlying this construction of the statute find support in *Irwin* v. *Gavit,* 268 U. S. 161, and *Heiner* v. *Beatty,* 17 F. (2d) 743 (C. C. A. 3d), affirmed, *Beatty* v. *Heiner,* 276 U. S. 598.

In *Irwin* v. *Gavit, supra,* the testator provided for the creation of a trust fund and the payment of part of the income therefrom to the taxpayer for life. The taxpayer urged that the payments were exempt as bequests. The argument was urged there by the taxpayer (as it has been in this case) that the payments were not income although paid out of income from the trust estate, because the taxpayer received no interest in the corpus. The reasoning of this Court, although specifically applicable to the Revenue Act of 1913, is equally controlling under the Revenue Act of 1921. The Court said (pp. 167-168):

> But we think that the provision of the act that exempts bequests assumes the gift of a corpus and contrasts it with the income arising from it, but was not intended to exempt income properly so-called simply because of a severance between it and the principal fund. No such conclusion can be drawn from *Eisner* v. *Macomber,* 252 U. S. 189, 206, 207. The money was income in the hands of the trustees and we know of nothing in the law that prevented its being paid and received as income by the donee.
>
> The Courts below went on the ground that the gift to the plaintiff was a bequest and carried no interest in the corpus of the fund. We do not regard those considerations as conclusive, as we have said, but if it were material a gift of the income of a fund or-

> dinarily is treated by equity as creating an interest in the fund. Apart from technicalities we can perceive no distinction relevant to the question before us between a gift of the fund for life and and a gift of the income from it. The fund is appropriated to the production of the same result whichever form the gift takes. * * * It is said that the tax laws should be construed favorably for the taxpayers. But that is not a reason for creating a doubt or for exaggerating one when it is no greater than we can bring ourselves to feel in this case.

The court below sought to distinguish *Irwin* v. *Gavit, supra,* and *Beatty* v. *Heiner, supra,* upon the theory that in those cases the will expressly required that the payments be made out of income, and a specific fund was set aside for the production of the income. In the present case, the residuary estate was held for the payment of annuities and for other named purposes, and the annuity was in fact paid out of the income of the estate. (R. 20.) Annuities are primarily paid out of income. *Cummings* v. *Cummings,* 146 Mass. 501, 508. The fact that in a prior or subsequent year there may have been no available income, and that the annuity may be paid out of corpus in such years, would not alter the principle that the payments are taxable as income when in fact made from income.

II

NO QUESTION OF DOUBLE TAXATION IS INVOLVED

Respondent urged below that double taxation would result from petitioner's construction because of the estate tax levied upon the transfer of the net estate.

In view of the express provision of the statute that beneficiaries shall pay an income tax upon the income of estates distributed periodically to such beneficiaries, the question of whether double taxation may result is immaterial. In this connection, this Court, in *Hellmich* v. *Hellman*, 276 U. S. 233, said (p. 238):

> When, as here, Congress has clearly expressed its intention, the statute must be sustained even though double taxation results. See *Patton* v. *Brady*, 184 U. S. 608; *Cream of Wheat Co.* v. *Grand Forks*, 253 U. S. 325, 330.

See also the analysis of the question by the Board of Tax Appeals in the case of *Bull* v. *Commissioner*, 7 B. T. A. 993, 1000–1001.

While the question of double taxation is, therefore, immaterial, it is clear that no double taxation will result from the taxation of the annuity as income in this case. The estate tax is levied upon the transfer of the net estate of the decedent and is based upon the value of the net estate. Revenue Act of 1921, Sec. 401, 42 Stat. 277. Such tax upon transfers measured by the value of the net estate,

has no relation to the taxation of the annuities. The income from the estate, when distributed to the beneficiaries, does not reduce the corpus, and the taxation of the annuities does not fall upon the corpus. Likewise, the tax upon the transfer of the net estate does not affect the specific annuity payable to the respondent.

Moreover, the estate tax is not an income tax, but is an excise tax levied upon the transfer of the net estate. *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349; *Knowlton* v. *Moore*, 178 U. S. 41; Revenue Act of 1921, Sec. 401. Such a tax has a purpose different from that of the income tax, and the levying of a tax upon the transfer of a net estate is distinct from, and in no sense inconsistent with, a tax upon the income arising from the estate.

III

THE ANNUITY IS TAXABLE INCOME TO THE ANNUITANT IRRESPECTIVE OF WHETHER SHE HAD PREVIOUSLY RECEIVED FROM THE ANNUAL PAYMENTS AN AMOUNT EQUAL TO THE VALUE OF THE BEQUEST OF THE ANNUITY AT THE TESTATOR'S DECEASE

Respondent also urged below that no taxable income arises from annuity payments until she has received amounts equal to the value of the annuity determined as of the date of testator's death. In support of the argument, respondent cited several decisions, including *United States* v. *Bolster*, 26 F. (2d) 760 (C. C. A. 1st). But in each of the cases cited the taxpayers accepted the annuities in lieu of

dower or similar statutory rights in the estate of the decedent. Under those facts, it was held that the waiver of the dower right was a valuable consideration, and the annuities represented "purchase money" or a return of capital. In *United States* v. *Bolster, supra,* the court recognized the distinction between that case and *Heiner* v. *Beatty,* 17 F. (2d) 743 (affirmed, *Beatty* v. *Heiner,* 276 U. S. 598), here relied upon by the petitioner, and said (p. 763):

> In *Heiner* v. *Beatty, supra,* it was contended that income received by the taxpayer under the will of the decedent was exempt from taxation because that income constituted a "bequest." In the instant case the ground of the exemption is, not that the income received is a bequest, but that such income is exempt, because it represents "purchase money" or a return of capital. In that case the record disclosed facts similar to those in *Irwin* v. *Gavit, supra.*

The facts in the present case show that the taxpayer received, as an annuity, income from the decedents' estate and not a return of an invested capital sum. There was no investment of any capital sum by the taxpayer to the return of which she might be entitled. The capitalized value of the annuity which forms the basis for the estate or transfer tax in the present case is analogous to that part of the corpus of the estate in *Heiner* v. *Beatty, supra,* from the income of which the annuity was paid. In fact, in *Heiner* v. *Beatty,* the executors

were given the authority, in the alternative, to purchase an annuity for the beneficiary. In neither instance was there cost to the annuitant, and it is clear from the opinion in *Heiner* v. *Beatty* that the annuity payment would likewise have been taxed as income to the beneficiary if the annuity had been purchased by the executors under their alternative power. The important consideration in that (as well as in the present case) is that the annuitant contributed no purchase price, incurred no cost, and invested no capital sum to the return of which she was entitled before taxable income arose.

CONCLUSION

In view of the importance of the question here presented, as well as the probable conflict of the decision of the Circuit Court of Appeals with decisions of this Court, it is urged that this petition be granted.

Respectfully submitted.

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